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Supreme Court, U.S.
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No. ____

In The
# Supreme Court of the United States

**October Term, 2000**

SHANNON GRAY

*Petitioner,*

vs.

THE PEOPLE OF THE STATE OF COLORADO

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the admission into evidence at a criminal trial of a confession elicited subsequent to a violent physical confrontation between Petitioner and a police officer is consistent with due process and with the Fifth Amendment right against self-incrimination, where the altercation involved the use of a choke hold to pin the Petitioner up against an interview room wall to prevent the departure of Petitioner, who had not been told that he was not free to go?

2. Whether a criminal suspect's attempt to terminate an interview by telling officers that he was tired of them "fucking" with him and getting up to leave is in the least "ambiguous" as to whether it represents the expression of a desire to terminate custodial interrogation?

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## PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

## OPINION BELOW

The opinion of the Colorado Court of Appeals is set forth in the Appendix, as is a copy of the Order denying rehearing; the Order by the Colorado Supreme Court denying Writ of Certiorari, rendering this a final judgment, is also contained therein.

## GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

28 U.S.C. Section 1257(a): Certiorari for review of state court criminal proceedings.

## CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment V:

> No person...shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law...

## STATEMENT OF THE CASE

On July 19, 1994, the Petitioner, a 23 year old first-time father stationed with the United States Army at Fort Carson in Colorado Springs, Colorado, confessed to angrily shaking his infant daughter causing her serious injury after a lengthy and combative interrogation by police officers in a tiny[1] and hot interview room, an interrogation highlighted by a violent confrontation in which a formidable police detective grabbed the Petitioner around the neck with a choke hold administered near the carotid artery and shoved him up against a wall to keep him from leaving.

The confession in question was elicited only after hours of interrogation; from the very beginning of the interview, the Petitioner, Shannon Gray, showed obvious signs of being unwell physically, complaining of lightheadedness, dizziness, and neurological tingling, while becoming chilled and disoriented. The interviewing officers also noted discernable noises emitting from Petitioner's stomach, and observed him engaging repeatedly in a peculiar rocking motion during which Petitioner grabbed his stomach. Despite this, however, no medical atten-

[1] The room measured 8' x 10'.

tion was provided to Petitioner until after he eventually confessed, fifteen to twenty minutes after the altercation.

Although Miranda warnings were read to Petitioner at the beginning of the interrogation, Shannon Gray was never told that he was under arrest or that he could not leave the interview room...at least up until the time came when he became determined to terminate the questioning by getting up to leave, while at the same time telling the officers that he was "tired" of them "fucking" with him. At that point, a much larger police detective trained in the use of choke holds physically restrained Petitioner up against a wall and held him there, telling Gray that he had to sit down and cooperate or else be charged with assault.

Despite the fact that Petitioner had expressed an unequivocal desire to terminate police questioning by attempting to leave the interview room, leading to him being seized and thrust up against the wall by an angrily accusative police officer, questioning did not cease. On the contrary, the interrogation intensified, without additional Miranda warnings having been given. Gray was never told that he could now have a lawyer or that he could stop the interview process by simple request, an interrogation which by that time was well into its second hour.

Only following his having been grabbed by the neck and threatened did Petitioner make incriminating statements, eventually admitting that he had shaken the baby during a difficult bath time; the statements thus obtained were used extensively during Petitioner's trial both as substantative evidence and to impeach the credibility of his testimony, testimony which included loving descriptions of the baby's birth and his role as a proud new father during the first weeks of the infant's life.

The trial court denied suppression; based in no small part on this coerced confession, the state court jury found Petitioner guilty of child abuse causing serious injury; he was subsequently sentenced to serve 28 years imprisonment.

The Colorado Court of Appeals initially reversed and remanded for findings pursuant to Davis v. United States, 512 U.S. 452, 114 S.Ct 2350, 129 L.Ed.2d 362 (1994), directing the trial court to "determine under the totality of the circumstances, whether a reasonable police officer would understand the statement and conduct that issued to be an unequivocal and unambiguous assertion of the right to terminate questioning." People v. Gray, 975 P.2d 1124, 1130 (Colo. App. 1997). Upon remand, the trial judge belatedly concluded that Petitioner's communications were "ambiguous" so as to not lead a reasonable law enforcement officer to conclude that Gray was attempting to exercise his right to remain silent.

On renewed appeal, the Colorado Court of Appeals reversed. In this second opinion, dated September 16, 1999, the intermediate state appellate court decided through *"de novo"* review that Shannon Gray's conduct in getting up to leave and the accompanying statement were so ambiguous that it was reasonable for the police officers to continue question Petitioner without further advisement even after Petitioner had been manhandled (Appendix A). Although this decision resolved an important federal question in a way that conflicts with the relevant decisions of this Court, the Colorado Supreme Court denied certiorari review, on March 20, 2000 (Appendix B).

## ARGUMENT

### PETITIONER'S ADMISSIONS OF RESPONSIBILITY FOR HIS INFANT DAUGHTER'S INJURIES WERE UNCONSTITUTIONALLY OBTAINED IN VIOLATION OF MIRANDA, EDWARDS v. ARIZONA, AND MICHIGAN v. MOSLEY, AND AS SUCH, WERE IMPROPERLY ADMITTED INTO EVIDENCE DURING HIS STATE COURT TRIAL

This Court's seminal decision in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) stands as a landmark in American jurisprudence. More than any other Supreme Court decision of the last century, the meaning, extent, and significance of Miranda has been reiterated on literally countless occasions over the years by trial and appellate courts all across the country.

This Court did not create the requirement for Miranda warnings out of whole cloth in 1966. Rather, in the Miranda decision, this Court explored at length the historical underpinnings of the Fifth and Sixth Amendments, concluding that the inherently coercive realities of modern custodial questioning justified the necessity for pre-interrogation warnings, because of the traditional significance of the rights to counsel, due process, and to silence:

> These precious rights were fixed in our Constitition only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured 'for ages to come, and... designed to approach immortality as nearly as human institutions can approach it.'...Id at 422, quoting Cohen v. West Virginia, 6 Wheat 264, 387, 5 L.Ed. 257, 287 (1821).

This court also drew inspiration from the English experience in acknowledging and appreciating the essential importance of the right to remain silent:

> While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier of state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no general opinion, but upon a general and silent acquiescence of the courts in a popular demand. Id. at 442-443.

As a consequence, held this Court in Miranda, from a historical perspective alone, the law is that:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or

> otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned. Id. at 444-445.

In formulating the Miranda warnings and effectuating a "fruit of the poisonous tree" analysis by creating evidentiary limitations on the use of involuntary, uncounseled, or unwilling statements, this Court analyzed at length then-current questioning techniques utilized by law enforcement officers, both in the distant and unfortunately no-so-remote past, tactics which unfortunately included physical violence, known colloquially as the "third degree."

However, as this Court stressed in Miranda: "the mod-

ern practice of in-custody interrogation is psychologically rather than physically oriented." Id. at 448. That physical violence occurred as in this case is of course significant in assessing whether admissions were volitional, but even in the absence of overt violence, the focus under Miranda is on the nature of the techniques used in a particular case to coerce an individual to provide incriminating evidence. Among others, more modern interrogation techniques as were described in Miranda, was the tactic of direct accusation:

> The guilt of the subject is to be posited as a fact. The interrogator should direct his comments towards the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Id. at 450.

As the Court explained in Miranda: police manuals also "suggest that the subject be offered legal excuses for his actions in order to obtain an initial admission of guilt." Id. Both such techniques were utilized in the interrogation of Petitioner, over and above physical violence, and as this Court cautioned reviewing appellate courts:

> Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals. Id. at 455-456.

In crafting the Miranda warnings, this Court emphasized that in the several cases before it at that time which implicated the issue: "the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures." Id. at 458. In this case, Petitioner was brought into custody in a severely stressful situation, with his baby girl hav-

ing experienced medical difficulties while he himself was ill. The questioning officers pressured young Shannon Gray almost from the outset of the interview to explain what might have happened to his daughter, while at the same time keeping Gray entirely in the dark about the severity of the injuries.

Gray was never told explicitly at the outset of the interview that he was not free to leave. Gray did make some statements initially after Miranda advisement; however, those statements were exculpatory, and did not include any admission of having shaken the baby, the conduct which was the focus of the police investigation and which became the ultimate theory of prosecution. Only after Petitioner unsuccessfully sought to leave and had been forcibly restrained were clearly inculpatory statements elicited, and only then, without further Miranda advisements and without honoring Petitioner's obvious intent to terminate the interview entirely.

In this case, just as was presaged by this Court in Miranda, the testimony at the suppression hearing revealed, as was found by the trial court, that the questioning officers utilized "special interrogation techniques designed to induce" a confession. Here, just as was detailed in Miranda, the interviewer directed his inquiry "toward the reasons why the subject committed the act," such as having had "an unhappy childhood," or to offer "legal excuses for (the suspect's) actions in order to obtain an initial admission of guilt." Id. at 450, 451. Here, the officers created an "atmosphere of disclosure" during which Shannon Gray revealed that he had been abused as a child, which then led officers to ask Gray sympathetically whether there could be circumstances where someone who had committed an act of child abuse should be given a "second chance" as a ploy to convince Gray to admit to shaking his daughter.

When this tactic too did not succeed, the two officers who had been forcefully confronting Shannon Gray were joined in the cramped interview room by still a third, this one trained as a paramedic. It was then, with now a total of three officers accusing him of child abuse and essentially calling him a liar, that Shannon Gray got up and tried unsuccessfully to leave while saying he was tired of the officers "fucking" with him.

The interrogation techniques used in the Gray interview were not merely limited to psychological persuasion; the tactics utilized included withholding information from the petitioner for the purposes of trapping him later on, confronting him with perceived inconsistencies in his accounts, and exploitation of the officers' knowledge of the "shaken baby syndrome" and Shannon Gray's ignorance of that specialized area of forensic science, in order to pressure Shannon Gray into making a confession.

Finally, the techniques employed in the questioning of Petitioner included actual application of physical force, with one of the officers grabbing Shannon Gray by the neck and pushing him against a wall while for the first time telling Gray that he was not free to go, conduct followed by another officer directing Gray "to sit back down." As Shannon Gray testified at trial, he was told by the officers in no uncertain words, after he had futilely attempted to leave, that he would not be allowed to terminate the questioning and leave the police station until he had told the officers "what they wanted to know." These techniques were hardly consistent with Miranda and its progeny, reflecting precisely the types of inherently coercive techniques used to obtain damning admissions from the criminally accused prior to the announcement of the Miranda decision.

However, Miranda was not the first time that this Court

had emphasized the importance of the Fifth Amendment. In discussing prior precedent, the Miranda court appropriated from earlier decisions the recognition that the right against self-incrimination "is the hallmark of our democracy," thus requiring the criminal justice system to "respect the inviolability of the human personality so as to require independent proof of guilt" as opposed to employing the cruel, simple expedient of compelling it from (the suspect's) own mouth." Id. at 460, quoting United States v. Grunewald, 233 F.2d 556, 581-82 (dissenting opinion of Judge Frank)(3rd Cir. 1956) and Chambers v. Florida, 309 U.S. 227, 235-238, 60 S. Ct. 472, 84 L.Ed. 716 (1940).

Unless diligently protected, the right against self-incrimination and the entitlement to legal counsel are rights which disappear whenever an individual's will is broken by overwhelming interrogation techniques: "in sum, the privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." Id. at 460, quoting Malloy v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489,12 L.Ed.2d 653 (1964).

The Miranda decision definitively established that if an individual "indicates in any manner that he does not wish to be interrogated, the police may not question him." Id. at 445. As this Court noted in Miranda, the rule there established was designed to be truly inflexible, a "bright-line" rule articulated and summarized long before the concept of the "bright-line" constitutional law ruling had been expressly enunciated:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he is shown that he intends to exercise his Fifth

> Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has once been invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking with police, they must respect his decision to remain silent. Id. at 473-474.

The Miranda decision made clear how fundamental proper advisement is to an adequate protection of constitutional entitlements, and the duty of interviewing officers, no matter how well-intentioned or zealous, to honor a suspect's expression of a desire to terminate questioning. Rather than intend the warning to be meaningless legalese litany, this Court warned: "the requirement of warnings and waiver of rights is fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." Id. at 476.

As this case proves, the right of a suspect to "cut off" questioning is crucial: without this right, the inherently coercive setting of custodial interrogation has the effect of overcoming free will, thus producing incriminating statements in violation of constitutional entitlement. Miranda, 384 U.S. at 474. Thus, while the initial exculpatory responses of Shannon Gray, obtained after Miranda advisement, were fully

admissable, it violated the Fifth and Sixth Amendments to permit the introduction into evidence at Petitioner's trial the statements made after Petitioner was physically accosted as well as accused.

By his words and conduct, Shannon Gray communicated emphatically and unequivocally his desire to terminate questioning, yet Petitioner was not only violently prevented from leaving, he was questioned still further and was not advised per Miranda. This case therefore calls for the application of the prophylactic rule designed to safeguard essential freedoms, that once the accused expresses a desire to remain silent all questioning must cease, a rule which applies even if the suspect previously "has been advised of his rights..." Edwards v. Arizona, 451 U.S. 477, 484, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). See also Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988).

In order to justify the admission of statements by the accused, the burden is always completely on the prosecution to show compliance with Miranda, but not just that: it is absolutely incumbent upon the State to show voluntariness as well, by no less than a preponderance of the evidence. Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). While voluntariness depends on an evaluation of the totality of circumstances, see Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), the record of the trial court pretrial hearings and trial in this case make inescapable the conclusion that the admissions obtained from Shannon Gray were essentially involuntary as a matter of law, and were unconstitutionally obtained in violation of Miranda and Edwards following Petitioner's abortive efforts to terminate questioning by getting up to leave.

Because of what Shannon Gray was told by the officers after he had been grabbed by the neck and thrown against a wall, Shannon Gray understandably felt that he had no choice but to do what the officers requested. This is of utmost significance: "coercion is determined from the perspective of the suspect." Illinois v. Perkins, 496 U.S. 292, 296, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990). As this Court recognized in Perkins: "Questioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressure that the Court has assumed will weaken the suspect's will..." Id. at 297. That was precisely the case here.

Once Shannon Gray unsuccessfully tried to leave, no Miranda warnings were given, and Petitioner was again questioned; Petitioner obviously did not initiate the subsequent conversation with the police by evincing a "willingness and a desire for a generalized discussion about the investigation" because of his unmistakable actions in swearing and trying to walk out of the interview room. See Oregon v. Bradshaw, 462 U.S. 1039, 1045-46, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983). Indeed, the opposite was true: here the officers persisted in questioning Shannon Gray even after he had vainly tried to leave the interview room. As well as being inconsistent with Miranda and Edwards, this conduct by law enforcement officers violated the clear-cut rule enunciated in Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

In Mosley, the accused told the police after questioning began that he did not want to answer questions. Although questioning temporarily terminated, a short time later interrogation resumed. In deciding Mosley, this court concluded as follows:

> [U]nless law enforcement officers give certain specified warnings before questioning a person in custody,

> and follow certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot over his objection be admitted in evidence against him as a defendant in trial, even though the statement may in fact be wholly voluntary. Id. at 99-100.

Those required procedures include, as an integral part of the Miranda formulation, that law enforcement officers scrupulously honor a suspect's right to remain silent. Id. at 104.

As this Court had emphasized in Miranda, the fact that a suspect consents to some questioning after initial Miranda warnings matters not if at any time a suspect expresses a desire to terminate the interview. As this Court succintly stated: "[I]f the individual is alone and indicates *in any manner* that he does not wish to be interrogated, the police may not question him." Id. at 445. This rigid requirement holds true even if, as here, the citizen being questioned "may have answered some questions." Id. at 445.

It thus belies belief to assert that by telling the interviewing officers that he was tired of them "fucking" with him, and getting up to leave, stopped only by physical force, Shannon Gray was doing anything but communicating "in any manner' that he did not wish to be interrogated further. It was at that point that the boundaries drawn by Miranda, Edwards, and Mosley were unconstitutionally encroached upon.

In affirming, the trial court and intermediate appeals court both utilized a niggardly approach to this aspect of Miranda, Edwards, and Mosley: both concluded that telling police officers that he was tired of them "fucking" with him while unsuccessfully trying to leave was "ambiguous" as to

intent. The trial court opined that despite what happened, it was appropriate for the police to question Gray without readvisement because the police "cannot read the defendant's mind. They can only judge his actions and his words." Similarly, the Colorado Court of Appeals concluded that what Gray did and said "could be viewed as a statement of frustration or exasperation," while at the same time admitting that it "could be viewed as an effort to stop the questioning."

Contrary to the state court's conclusions, the historical facts surrounding the elicitation of Shannon Gray's confession make it clear, based on Miranda and a plethora of other dispositive decisions of this Court, that the admissions in question were unconstitutionally obtained, statements which essentially ensured conviction because: "A confession is like no other evidence." Arizona v. Fulminante, 499 U.S. 279. 296, 111 S.Ct 1246, 13 L.Ed.2d 302 (1991). In this case, as in many contexts, actions speak louder than words, and Shannon Gray's actions in attempting to physically prevent further questioning were just as effective in invoking Miranda and Mosley than would be the most eloquent allocution by an accused.

In this regard, the reliance of the Colorado Court of Appeals, after remand reconsideration, upon this Court's decision in Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), was misplaced. In the Davis case, the accused stated an hour and a half into an interview that "maybe I should talk to a lawyer." Subsequently on appeal, this Court upheld the resultant murder conviction concluding that suspect statements that are "ambiguous or equivocal" in an objective sense "do not require the cessation of questioning." 512 U.S. at 459. Here, however, the objective facts as established below did require reasonable officers to conclude that the conduct and statements of Shannon Gray demonstrated an intent to termi-

nate the interview. As a consequence, Davis does not support affirmance.

Moreover, by way of analogy, this Court emphasized in Smith v. Illinois, 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984), that the invocation of the right to remain silent and the waiver thereof are entirely distinct, different inquiries; thus, where the Edwards "bright line" rule applies, as the result of a suspect invoking the right to remain silent, all questioning must cease without resort to the retrospective "waiver" analysis employed by the Colorado State courts in this case. Smith, 469 U.S. at 98. See also Roberson, 486 U.S. at 685; Minnick v. Mississippi, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990); Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed. 631 (1986).

While Shannon Gray arguably could have been more genteel and articulate in communicating to the interrogating police officers his desire to terminate questioning, the statement uttered when coupled with his concerted effort to physically leave the interview room left no doubt, for constitutional purposes, that the protections of Miranda, Edwards, and Mosley had been implicated. Thus, in light of the established fact that no additional Miranda warnings were provided, and because the questioning officers did not confirm with Shannon Gray that he was willing once again to agree to further questioning, Petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution were violated. See Mosley, 423 U.S. at 104; Miranda, 384 U.S. at 473. As a consequence, Petitioner prays for an order granting certiorari, to reverse the judgment of the Colorado Court of Appeals affirming Petitioner's conviction of felony child abuse.

Respectfully submitted,

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**APPENDIX A**

COLORADO COURT OF APPEALS
No. 98CA1596

THE PEOPLE OF THE STATE OF COLORADO
Plaintiff-Appellee,

v.

SHANNON R. GRAY
Defendant-Appellant.

Appeal from the District Court of El Paso County
Honorable Michael J. Heydt, Judge
No. 94CR2345

DIVISION III JUDGMENT AFFIRMED

Opinion by JUDGE CASEBOLT
Plank and Roy, JJ., concur

Ken Salazar, Attorney General
Barbara McDonnell, Chief Deputy Attorney General
Michael E. McLachlan, Solicitor General
Matthew S. Holman, Assistant Attorney General, Denver, Colorado
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Attorney for Defendant-Appellant

Defendant, Shannon R. Gray, appeals the judgment of conviction entered upon a jury verdict finding him guilty of child abuse causing serious injury. We affirm.

In a prior appeal, defendant asserted, among other things, that the trial court had erred in denying his motion to suppress incriminating statements made both during and after custodial interrogation. As pertinent here, defendant claimed he had invoked his right to stop the interrogation when he told the detectives that he was "tired of them fucking with him" and attempted to leave the room. See People v. Gray, 975 p.2d 1124 (Colo. App 1997)

In Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), the Supreme Court established the legal standard for determining whether a criminal suspect has invoked his or her Fifth Amendment right to counsel. Under that standard, the trial court must consider whether the suspect's statement reasonably could be construed to be an expression of a desire for the assistance of an attorney.

In People v. Gray, supra, a division of this court adopted the Davis holding and remanded the cause to the trial court to apply that rationale in determining whether defendant's words and conduct were sufficient to invoke his Fifth Amendment right to terminate questioning.

Under Davis, if the suspect makes a reference to an attorney that is ambiguous or equivocal, in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, questioning need not be terminated. Davis v. United States, supra. An ambiguous communication in this context is one that gives rise to opposing inferences. People v. Romero, 953 P.2d 550

(Colo. 1998).

Here, on remand, the trial court concluded that defendant's words were ambiguous and that his conduct would not have led a reasonable police officer to conclude that he was clearly and unequivocally exercising his right to remain silent. The court, therefore, once again denied defendant's motion to suppress.

Our de novo review of the words and conduct at issue leads us to the same conclusion. Defendant's statement, even when combined with his attempt to leave the room, was insufficient to invoke clearly and unequivocally his right to terminate questioning. See People v. Valdez, 969 P.2d 208 (Colo. 1998) (the legal effect of the controlling facts in a motion to suppress is a question of law subject to de novo review); see also People v. Romero, supra (reviewing de novo whether the defendant sufficiently invoked his Fifth Amendment right to counsel).

Defendant's statement was ambiguous in the context of his Fifth Amendment rights. It could be viewed as a statement of frustration or exasperation. Alternatively, it could be viewed as an effort to stop the questioning. And, his brief attempt to leave the room after making that statement, when considered with the fact that he then returned to the interview table and resumed answering questions, would not have led a reasonable police officer to conclude that he was clearly and unequivocally exercising his right to terminate the interview. Accordingly, we also conclude that defendant did not unequivocally and unambiguously invoke his right to remain silent.

While we agree that the better practice would have been for the detectives to clarify defendant's intentions after he

attempted to leave the room, their failure to do so did not render the subsequent confessions unconstitutional. See Davis v. United States, supra (while it may be good police practice for the interrogating officer to attempt to clarify a suspect's ambiguous or equivocal statement, he or she is not required to do so).

The judgment of conviction is affirmed.

JUDGE PLANK and JUDGE ROY concur.

**APPENDIX B**

SUPREME COURT, STATE OF COLORADO
Case No. 99SC903

ORDER OF THE COURT

SHANNON GRAY
Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO
Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after careful review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MARCH 20, 2000

(SEAL)

cc:

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MatthewS. Holman, AGG
Appellate Division

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